

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In re	)	
	)	
Television Broadcast Station	)	
KBEH(TV), Oxnard, California	)	MM Docket No. 17-121
FCC Facility ID 56384	)	File No. BALCDT-20170428AAS
	)	
Application for Assignment of License	)	
from	)	
HERO LICENSECO LLC	)	
(Assignor)	)	
to	)	
KWHY-22 BROADCASTING, LLC	)	
(Assignee)	)	

**COMMENTS OF NORTHSTAR SAN FRANCISCO LICENSE, LLC**

Northstar San Francisco License, LLC (“Northstar”), licensee of KEMO-TV, Santa Rosa, CA, hereby submits its comments supporting grant of the above-captioned Application to assign the license for auction winning station KBEH to its proposed channel sharing partner.<sup>1</sup>

Northstar was a successful bidder in the FCC’s recently completed incentive auction for the spectrum associated with KEMO-TV. As did KBEH, KEMO currently is exploring post-auction channel sharing arrangements. Some potential arrangements could involve the sale of the KEMO license to another in-market broadcaster who would then self-share with its own station, thus operating two licensee stations from one 6 MHz television channel. This type of business arrangement and license structure was anticipated and approved by the FCC in its *Channel Sharing Rules* – rules that were adopted to encourage broadcasters to participate in the

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<sup>1</sup> The Application requests FCC approval for the for assignment of the license of KBEH(TV), Oxnard, California from Hero Licenseco LLC to KWHY-22 Broadcasting, LLC, a subsidiary of Meruelo Television LLC and the licensee of KWHY-TV, Los Angeles, California (the “Application”). See Public Notice, DA 17-434, released May 8, 2017 (“*Public Notice*”).

incentive auction.<sup>2</sup> Now, post-auction, as parties enter into business relationships in reliance on the FCC's *Channel Sharing Rules*, the *Public Notice* threatens to upend licensees' reasonable expectations by raising questions about the simple, straightforward KBEH Application. As demonstrated herein, the Application is consistent with the FCC's *Channel Sharing Rules* and complies with FCC precedent. Northstar therefore urges the FCC to grant the KBEH Application without further delay.

### **I. The Application Complies with the Channel Sharing Rules**

On February 22, 2012, the President signed the *Spectrum Act*, which required the FCC to hold a broadcast incentive auction.<sup>3</sup> Of note, the legislation directed the FCC to allow broadcasters a bidding option under which they would "relinquish[ spectrum] usage rights in order to share a television channel with another licensee."<sup>4</sup> Furthermore, the legislation specifically recognized that a broadcast television station that voluntarily relinquishes spectrum in order to share a channel would retain its licensee rights, such as its cable carriage rights, and that such rights would be applied to a sharing licensee in the same manner as if the station were not sharing a channel.<sup>5</sup>

When implementing the *Spectrum Act*, the FCC followed the statutory directives of Congress and adopted rules under which channel sharing agreements would be flexible and

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<sup>2</sup> See, e.g., *Report and Order*, 27 FCC Red 2626 (2012) ("*Channel Sharing Order*") and *First Order on Reconsideration and Notice of Proposed Rulemaking*, 30 FCC Red 6668 (2015) ("*First Channel Sharing Reconsideration Order*"); see also 47 C.F.R. §§ 1.2200-1.2209 and 73.3700, as amended (together with subsequent FCC Orders, Public Notices and rules in GN Docket No. 12-268 and ET Docket No. 10-235, the "*Channel Sharing Rules*").

<sup>3</sup> See, e.g., Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6401, 6403 (codified at 47 U.S.C. § 1451 - 2), 126 Stat. 156 (2012) (the "*Spectrum Act*")

<sup>4</sup> 47 U.S.C. § 1452(a)(2)(C).

<sup>5</sup> 47 U.S.C. § 1452(a)(4).

voluntary.<sup>6</sup> As it developed the *Channel Sharing Rules*, the FCC determined that licensee rights under a channel sharing agreement could be assigned or transferred, subject to the requirements of Section 310 of the Communications Act, just like any other FCC license.<sup>7</sup> The FCC also specifically allowed broadcast licensees with channel sharing agreements to contract for contingent rights such as puts, calls, options, and rights of first refusal, subject to the general FCC media ownership rules that apply to all broadcast licensees.<sup>8</sup> Indeed, the FCC specifically allowed broadcast licensees in channel sharing agreements to contract for “these common contingent rights” because doing so would “enable sharing parties to eliminate some of the uncertainty regarding the identity of their sharing partners in the event that one sharing party decides to sell its license.”<sup>9</sup>

Of note, under the *Channel Sharing Rules*, the FCC recognized that if two parties to a channel sharing agreement are commonly owned, a written channel sharing agreement would not be required.<sup>10</sup> Logically, this would apply both to broadcast licensees who filed auction applications to self-share spectrum between two commonly owned licensees and to broadcast licensees who obtain two licenses that share spectrum through a post-auction transaction. Accordingly, no written channel sharing agreement should be required in connection with the

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<sup>6</sup> See, e.g., *Channel Sharing Order* at ¶¶11 – 18.

<sup>7</sup> See, e.g., *Report and Order*, 29 FCC Rcd 6567 (2014) (“*Incentive Auction Report and Order*”) at ¶ 701.

<sup>8</sup> *First Channel Sharing Reconsideration Order* at ¶ 10.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Application Instructions for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, *Public Notice*, DA 15-1252 (rel. Nov. 19, 2015) at ¶35 (“You do not need to enter into or upload an executed channel sharing agreement as a sharee if the selected station will share a channel with a commonly-owned or controlled station. In place of a channel sharing agreement, you must upload a statement explaining how the stations subject to the channel sharing arrangement are commonly owned or controlled and that no written channel sharing agreement is required.”).

KBEH Application because the assignor would be able to self-share post-closing. Of course, the KBEH Application includes a channel sharing agreement, which makes the *Public Notice* all the more puzzling to other auction winners seeking post-auction channel sharing agreements.<sup>11</sup>

As the FCC's *Channel Sharing Rules* show, the FCC anticipated that auction winners might sell their licenses and that a logical purchaser would be the owner of the station with which they share spectrum. The Application does nothing more than effectuate the FCC's expectation of exactly this type of transaction. Given that there are no licensee holding periods and no limitations on the length of a channel sharing agreement,<sup>12</sup> grant of the Application is required, consistent with the FCC's *Channel Sharing Rules*.

## **II. The Application Complies with FCC Precedent**

As discussed above, grant of the Application is plainly required under the *Channel Sharing Rules*. Furthermore, grant of the Application is consistent with FCC precedent. The FCC never suggested any limitations on the assignment of post-auction licenses – with or without a channel sharing agreement. Absent such a limitation, auction winners that notified the FCC on their auction applications that they intended to pursue post-auction channel sharing agreements had every right to expect that they would be able to assign their post-auction licenses to any willing buyer. Such licenses permit a buyer to continue broadcasting on the station's current channel for a period of six months following a station's receipt of its auction proceeds

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<sup>11</sup> While KBEH included a written KBEH-KWHY Channel Sharing Agreement with its Construction Permit Application, the parties had not intended to implement their Channel Sharing Agreement until after they had closed the assignment of the license of KBEH to KWHY. See, e.g., FCC File No. BALCDT-20170428AAS; *Letter to Marlene H. Dortch, Secretary, Federal Communications Commission re KWHY-22 Broadcasting LLC and Hero Licenseco LLC*, MB Docket No. 17-121 (filed May 19, 2017). However, under the FCC's *Channel Sharing Rules*, a written channel sharing agreement was not legally required.

<sup>12</sup> The FCC specifically stated “we will permit broadcasters to choose the length of their channel sharing agreements.” *First Channel Sharing Reconsideration Order* at ¶ 20.

and to seek a channel sharing agreement.<sup>13</sup> If buyers exist for licenses – and the KBEH Application shows that they do – no justification exists for the Media Bureau to refuse to process their assignment applications for such licenses.

The FCC has previously recognized that licenses have value in and of themselves – even licensees of “bare” licenses have a reasonable expectation of an ownership interest in a license that is separate from the spectrum frequencies themselves. It is well established that Sections 301 and 304 of the Communications Act require “that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies.” However, the FCC has found that “the fact that Section 301 provides that licensees may have no ‘ownership’ interests in frequencies does not mean that they have no rights in the license itself.”<sup>14</sup> Indeed, in upholding a licensee’s right to transfer a license before any underlying facility associated with it had been built – a “bare” license – the FCC stated that “[a] broadcasting license is a thing of value to the person to whom it is issued. [P]rovisions of the Communications Act itself . . . recognize that a broadcasting license confers a private right, although a limited and defeasible one.”<sup>15</sup> Further, “[t]he language [of the Communications Act] does not bar the for-profit sale to a private party, subject to prior Commission approval, of whatever private rights a permittee has in its license.”<sup>16</sup>

Here, the Application merely requests FCC approval to transfer the “private rights” that KBEH has as a licensee. And, as indicated above, the licenses possessed by post-auction

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<sup>13</sup> See, e.g., 47 C.F.R. § 73.3700(b)(4)(ii).

<sup>14</sup> See Bill Welch, *Memorandum Opinion and Order on Review*, 3 FCC Rcd 6502, 6505 n. 27 (1988) (approving sale of unbuilt wireless permit).

<sup>15</sup> *Id.* at 6505 n.27, quoting *L. B. Wilson, Inc. v. FCC*, 170 F. 2d 793, 798 (D.C. Cir. 1948).

<sup>16</sup> *Id.* at 6503 (footnote omitted).

winners like KBEH and KEMO-TV are hardly “bare” because they have attached to them the current right to broadcast on a channel licensed by the FCC as well as the right to find a channel sharing partner for future operations.

For the reasons set forth above, Northstar submits that the transactions proposed in the Application accord fully with the Communications Act, the FCC’s *Channel Sharing Rules*, and existing FCC policies. Accordingly, the Bureau should grant the Application promptly, confirming that its *Channel Sharing Rules* indeed mean what they say and justify the reliance that licensees have placed upon them in participating in the reverse auction.

Respectfully submitted,  
Northstar San Francisco License, LLC

By:   
Mark P. Hirschhorn  
Vice President

June 5, 2017

CERTIFICATE OF SERVICE

I, Jack N. Goodman, hereby certify that I have caused a copy of the foregoing  
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this 5th day of June, 2017:

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A handwritten signature in blue ink, appearing to read "Jack N. Goodman", is written over a horizontal line.